



Evan Way

Legislation Reduces Barriers for Applicants with Criminal Convictions to Obtain Occupational Licenses

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Evan Way is a Crowe & Dunlevy attorney and member of the Labor and Employment Practice Group. Legislation making changes to occupational licensing opportunities for individuals with criminal convictions has been signed into law.

What did this legislation do and how will employers be affected based on the new statutes?

An occupational license is required for approximately 30 percent of the national workforce and includes professions such as bail bondsmen, physicians, barbers, masseuses, dieticians, accountants, locksmiths and cosmetologists. Prior to the enactment of HB 1373, individuals with criminal convictions — including misdemeanors involving moral turpitude and all felonies — were automatically disqualified from obtaining a state-issued occupational license. The blanket ban on criminal convictions (along with the requirement to be of “good moral character”) is now removed with the enactment of the new legislation. Today, licensing boards may disqualify an applicant only if the criminal conviction substantially relates to the occupation and poses a reasonable threat to public safety. Thankfully, “substantially relates” and “poses a reasonable threat” are identically statutorily defined across all occupational licenses affected by HB 1373. This legislation will undoubtedly increase the number of job applicants, as nearly one in three U.S. adults has a record in the criminal-justice system, but onus to screen applicants is largely on the licensing boards. For example, a potential licensee “may request an initial determination [from the licensing board] of whether his or her criminal history record would potentially disqualify him or her from obtaining the desired license ... including before obtaining any required education or training for such occupation.” Even though HB 1373 doesn’t directly speak to employers, all employers should be aware of several potentially problematic areas regarding criminal convictions.

Can an employer ask an applicant if he or she has been convicted of a crime?

Yes, federal law doesn’t prohibit employers from asking about an applicant or employee’s criminal history. Indeed, many employer handbooks contain lawful provisions that an employee has an affirmative duty to notify his or her employer of a criminal conviction. And because most Oklahoma employees are at-will, the employer may choose to terminate the employee based on a criminal conviction. Additionally, some employment applications include questions regarding past criminal convictions. The Equal Employment Opportunity Commission (EEOC) has stated that considering an individual’s criminal history may violate Title VII of the Civil Rights Act of 1964. The EEOC considers two areas of potential discrimination when criminal records are used, disparate-treatment discrimination and disparate-impact discrimination. An employer is liable for disparate treatment when there is evidence it rejected an applicant of a protected class based on a criminal record, but hired a similarly situated non-protected applicant with a comparable criminal record. Similarly, an employer is

liable for disparate impact when there is evidence that an employer's neutral policy has the effect of disproportionately screening out protected-class applicants and the employer fails to demonstrate the policy is job related and consistent with business necessity.

What do employers need to do to avoid allegations of disparate-treatment and disparate-impact discrimination regarding criminal convictions?

Employers must ensure that they do not reject an applicant of a protected class based on a criminal conviction while hiring a non-protected applicant who has a similar criminal record to avoid disparate-treatment liability. For disparate-impact allegations, the burden is on the employer to show it considered the nature of the crime, the time elapsed, the nature of the position sought, and that it provides an opportunity for the excluded applicant to demonstrate why he or she should not be excluded from employment consideration due to his or her criminal conviction. With the enactment of HB 1373, prudent employers may benefit from mirroring the licensing board's requirements regarding criminal convictions for occupational licensees. For example, the employer doesn't need to consider an applicant's past criminal record if he or she is qualified by the state to hold an occupational license. This would mitigate allegations of employer discrimination because employers would no longer disqualify applicants based on past criminal convictions.